

## Before the FEDERAL COMMUNICATIONS COMMISSION RECEIVED Washington, D.C. 20554

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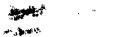
In the Matter of	)	FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY
	)	
Amendment of TV Table of Allotments,	)	BPRM-20000717ADM
TV Broadcast Stations.	)	
(Knoxville, Tennessee)	)	

Directed to: Chief, Video Services Division

## SUPPLEMENTAL SUMMARY INFORMATION REGARDING PETITION FOR RULE MAKING

Knoxville Channel 25, L.L.C. (hereinafter "KC25" or "Petitioner"), hereby respectfully submits a supplemental summary of pertinent facts relating to its pending proposal to allot DTV Channel 7 to Knoxville, Tennessee, as a new, stand-alone DTV service for that community. This information is being submitted in response to informal questions raised by the Commission's staff and is designed to allay any concerns which might arise out of the prompt issuance of a Notice of Proposed Rule Making ("NPRM") with regard to KC25's proposal. With respect thereto, the following is stated:

- 1. The Pending DTV Channel 7 Proposal is Technically Acceptable and Grantable
- 1. In 1996, KC25 initially submitted an application for construction permit for a new television station to operate on analog Channel 26 at Knoxville, Tennessee. At that time, the NTSC Television Table of Allotments listed Channel 26 as being allotted to Knoxville, and other, mutually exclusive applications for the channel were pending. This NTSC allotment was displaced, however, by a co-channel, paired DTV allotment at



Knoxville. Accordingly, KC25 submitted a petition for rule making to change the allotment for which it had applied to NTSC Channel 25, which petition was subsequently supplemented to offer DTV Channel 7 as an alternative. It is the DTV Channel 7 proposal which is now the primary proposal pending before the Commission.

- 2. It is clear that immediate issuance of the requested NPRM and adoption of the DTV Channel 7 proposal would serve the public interest. There are no technical impediments to grant of the proposed DTV Channel 7 allotment. Because the DTV Channel 7 proposal was submitted as part of the resolution of a conflict with a paired DTV allotment, it must be analyzed pursuant to the standards set forth in the Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders, 14 FCC Rcd 1348 (1998) ("Second MO&O"), and "Public Notice," Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog TV Stations, DA 99-2605, released November 22, 1999 ("Window Filing Notice"). Pursuant to the Window Filing Notice, applicants were allowed not only to petition for replacement NTSC channels, but also might "request a DTV channel as the replacement for the NTSC channel allotment, as the Commission indicated in paragraph 42 of the Second MO&O." Window Filing Notice at 5. Further, in evaluating such proposals, the staff was to look to "the criteria for changing an initial DTV allotment set forth in Section 73.622(a) of the rules. Specifically, ... DTV and NTSC stations must be protected by meeting the engineering criteria of Section 73.623©) of the rules." <u>Id.</u>
- 3. In its previous submissions, KC25 has demonstrated that it meets the requisite engineering standards. Through engineering statements, KC25 has shown that operation

from its proposed site fully satisfies all of the relevant interference criteria set forth in Section 73.623©) of the Commission's Rules with regard to all proximate NTSC and DTV facilities. Accordingly, there is no technical bar to immediately proceeding forward with the DTV Channel 7 proposal.

- 4. Further, it is clear that the public interest would be served by grant of that proposal. As the Commission seeks to advance the overall, national transition to DTV, stand-alone DTV facilities such as that proposed by KC25 are uniquely positioned to aid in that transition. As the Commission is aware, many existing television stations with paired DTV channels either remain off the air or are operating with substantially reduced facilities. In numerous instances, such operation is required because of the budgetary constraints associated with the added expense of operating a second transmission facility, and in other cases delays have resulted from unavailability of tower locations. The KC25 proposal, however, suffers from neither of these burdens. Its new facility would operate as a stand-alone station, and KC25 has previously reported the availability of an existing tower and antenna which would require only minor modification. As a result, KC25 has been able to commit itself to an expeditious commencement of DTV service.
- 5. Thus, the public would be served by the prompt introduction of a new television service in the Knoxville market. Moreover, not only would that introduction provide the ususal advantages of a new television voice in the market, but also the new programming provided would be uniquely in the DTV format. Additionally, because the station would operate at full power and full-time, this unique programming would be able to reach a greater audience in the overall market. As a result, viewers there would be encouraged to

acquire the receivers and/or adapters necessary in order to view the new programming available only from the DTV facility. In turn, the greater presence of DTV viewing equipment in the market would drive the demand for further DTV programming, thereby encouraging other stations to increase their offerings and advancing the DTV transition materially. Such effects are especially important in markets such as Knoxville, which rank below the top 30 markets but which nonetheless are major markets with substantial numbers of viewers. While markets of this size may not have the critical number of viewers who are keenly interested in advanced technology to propel the DTV transition through normal market forces alone, the adoption of DTV by such a substantial number of viewers would have a significant effect on the overall DTV transition. Therefore, the addition of further incentives for near-term DTV adoption by these viewers is of particular importance.

- II. The Underlying Channel 25 Proposal Also Was Acceptable As Filed.
- 6. As indicated above, the DTV Channel 7 proposal initially was advanced by KC25 as a secondary, alternative proposal to supplement its earlier petition requesting that NTSC Channel 25 be substituted for the displaced Channel 26 specified in its application. The petition for rule making seeking the substitution of Channel 25 was timely filed in accordance with the Commission's *Window Filing Notice* on July 17, 2000. At the time that the KC25 Supplement to Petition for Rule Making which first proposed the DTV Channel 7 alternative was filed on June 20, 2001, the underlying petition for rule making had been pending for nearly a year with no action. Accordingly, while KC25 made it clear in its Supplement that it continued to prefer the initially requested Channel 25 allotment, it

offered DTV Channel 7 as a potential alternative to remove any appearance of conflict with any other facilities and therefore expedite action on its proposal. Both at the time that the Supplement was filed and at the time that the initial petition was filed, however, there was no actual conflict with any other existing or proposed facility which would prevent immediate, favorable action on the Channel 25 proposal.

- 7. While the KC25 petition to substitute Channel 25 for Channel 26 as initially filed appeared for a time to have some possible technical defects, that appearance was largely illusory. The following is a discussion of the defects which appeared to exist and their actual resolution.
- 8. One apparent difficulty with the Channel 25 proposal as initially filed was a conflict with WPDP-LP (then WXMS-LP), Cleveland, Tennessee, a co-channel station which had filed a statement of eligibility for Class A status. KC25 acknowledged this apparent conflict in its Petition for Rule Making as initially filed, but noted that the station actually was not eligible for Class A status as it operated entirely as a translator for WDSI-TV, Chattanooga, Tennessee. In addition, on January 19, 2001, KC25 submitted a petition to deny the WPDP-LP Class A license application, again demonstrating the station's ineligibility for Class A status. Since the facility was not eligible for Class A protections, its existence could not impede the grant of the KC25 Channel 25 proposal. Thereafter, in order to expedite the matter and relieve the Commission of the need to rule on the issue,

It should be noted that, in rule making proceedings, the Commission has long held that it is free to substitute such an alternate channel in order to resolve a conflict. *Pinewood, South Carolina*, 5 FCC Red 7609 (1990); *Medford and Grants Pass, Oregon*, 45 R R.2d 359 (1979).

KC25 reached a settlement agreement with the licensee of WPDP-LP, which was filed with the Commission on June 7, 2001. Pursuant to that settlement agreement, the licensee agreed to modify the WPDP-LP facilities to operate on a different channel, and the Commission granted a construction permit for the station to modify its facilities to Channel 38 on September 18, 2001. Regardless of the later developments involving the settlement, however, it is clear that the Cleveland, Tennessee LPTV station posed no actual bar to the KC25 Channel 25 proposal from the beginning due to fact that KC25 had demonstrated the station's ineligibility for Class A status at that time.<sup>2</sup>

9. A second apparent conflict was with the co-channel Station WBQC-LP,
Cincinnati, Ohio. That station also had filed its statement of eligibility for Class A status,
and filed its Class A license application on December 15, 2000. In that application,
however, the licensee explicitly acknowledged that WBQC-LP could not be granted Class A
status on Channel 25 due to its failure to provide the required protection with regard to a
construction permit for modifications to the facilities of WBDT(TV), Springfield, Ohio.
While the Commission initially granted the Class A application, on January 25, 2001, KC25
petitioned for reconsideration of that grant due to its admitted failure to comply with the
Commission's rules governing interference protection. KC25's petition was granted on
April 24, 2002, the grant of Class A status on Channel 25 was rescinded, and the licensee of
WBQC-LP was requested to amend its Class A license application to specify Channel 38. It
is thus clear that, from the outset, WBQC-LP was ineligible for Class A status on Channel

While the station was subsequently granted Class A status, that grant came only in the context of the settlement reached with KC25.

25, and it also therefore created no actual impediment to grant of the KC25 Channel 25 proposal from the time of its filing.

10. A third Class A-eligible station which appeared to create a potential conflict with the KC25 Channel 25 proposal was WKTP-LP, Kingsport, Tennessee. Included in the June 20, 2001, Supplement to Petition for Rule Making, however, was an engineering study attached to an interference agreement which showed that, due to intervening terrain, no significant or harmful interference would be caused to the WKTP-LP operations by the proposed Channel 25 facility, nor would the WKTP-LP operations cause any interference to the proposed Channel 25 facility. Further, by the letter agreement dated January 19, 2001, the WKTP-LP licensee agreed to accept any such negligible interference as might be caused. This agreement was clearly in accordance with the Commission's Class A Report and Order, 15 FCC Rcd 6355, 6386 (2000) and Memorandum Opinion and Order on Reconsideration, FCC 01-123, released April 13, 2001, which specifically contemplates such agreements between Class A and full-power television stations. Accordingly, all questions of any concern with regard to interference to WKTP-LP were removed. Moreover, that concern actually was essentially nonexistent even prior to the interference agreement between WKTP-LP and KC25. The intervening mountainous terrain which limits any possibility of interference between the facilities obviously was in existence prior to and regardless of any agreement. The interference agreement and attached engineering statement merely served to confirm the facts of the situation as they existed at all relevant times, and indeed, most likely extending back for thousands of years prior to those times. Therefore, at the time that KC25 submitted its proposal, there was no reasonable likelihood

of significant, harmful interference from that proposal and thus no actual conflict with WKTP-LP's operations.

- allotment is short-spaced to Station WHIQ(TV), Huntsville, Alabama. Accordingly, Petitioner submitted a request for waiver of Sections 73.610 and 73.685(e) of the Commission's Rules, and demonstrated that such a waiver would be warranted under the circumstances. Specifically, Petitioner demonstrated that the proposed Channel 25 operation at Knoxville would cause less than 0.5 percent interference to WHIQ(TV), a figure which is within the Commission's rounding tolerance. In addition, the proposed waiver was similar to other such waivers previously granted by the Commission where, as in the instant proceeding, substantial public interest benefits would result. Moreover, it was noted that denial of a waiver based on rigid adherence to the mileage requirements of the Table of Allotments would have little relevance in the unique context in which NTSC licensing is forever coming to an end.
- 12. Perhaps more importantly, as KC25 has previously noted, the Commission was statutorily required to waive its rules in this regard. The proposed change in allotment to Channel 25 arose in the context of a universal settlement among mutually-exclusive applicants. Further, this Settlement Agreement was reached and filed with the Commission during the statutory settlement period established in the Balanced Budget Act of 1997. Section 309(l) was added to the Communications Act of 1934, as amended, by Section 3002(a) of the Balanced Budget Act. That section directs the Commission to "waive any provisions of its regulations necessary" to permit settlements to go forward and be

effectuated. 47 U.S.C. §309(I). Since the Settlement Agreement in this instance cannot be effectuated without grant of a channel change, the Commission was statutorily bound to grant the requested waiver to permit the change in channel.

13. Thus, at the time that the Channel 25 proposal was filed, there existed no actual conflicts which Petitioner had not already met and addressed. While there were some apparent obstacles to immediate grant, the actual facts and circumstances demonstrated that there were no real or significant impediments to implementation of the Channel 25 proposal at that time. Therefore, the Channel 25 proposal partook of the very essence of acceptability at the time that it was filed.

## III. The Sole Remaining Obstacle to Grant of the Channel 25 Proposal Arose Well After Its Filing

- 14. The sole remaining obstacle which impedes going forward at this time with the Channel 25 proposal is the now-granted modification application of noncommercial educational WUNF-DT, File No. BMPEDT-20010731AAG. The Channel 25 Petition for Rule Making as initially filed demonstrated that there would be no conflict with the WUNF-DT allotted facilities. It was only when WUNF-DT submitted its modification application that any difficulty with WUNF-DT arose. That modification application was not filed until July 31, 2001, over a year after the filing of Petitioner's Channel 25 proposal. This filing even came over a month after Petitioner's supplemental filing on June 20, 2001.
- 15. Indeed, it should be noted that the WUNF-DT filing came well over a year after the May 1, 2000, deadline for the filing of DTV maximization applications pursuant to the Community Broadcasters Protection Act. The window filing opportunity pursuant to

which Petitioner initially submitted its Channel 25 proposal was extended specifically so that applicants might avoid potential conflicts with DTV maximization applications. See, "Public Notice", Window Filing Opportunity for Certain Pending Applications and Allotment Petitions for New Analog Stations Extended to July 15, 2000, DA 00-536, released March 9, 2000 ("Window Filing Extension Notice"). Nonetheless, because WUNF-DT waited until July 31, 2001, to file its application, KC25 has been faced with just such a conflict.

16. Clearly, the WUNF-DT application represents a change in circumstances beyond the control of KC25. It further was not a matter which KC25 could have reasonably foreseen or taken into account more than a year before its filing. Since the filing was made by an unrelated third party, KC25 could not have any control or influence over the filing, nor could it have advance knowledge. It is this change in circumstances created by the WUNF-DT filing which has caused KC25 to shift to advancing its DTV Channel 7 proposal as its primary proposal rather than as a secondary alternate. Fundamental fairness requires the acceptance and consideration of this proposal under the circumstances. The DTV Channel 7 proposal fully resolves the perceived conflict with the WUNF-DT application and thus will allow a change in the allotment to go forward at this time, without further delay. As set forth above, grant of the requested change in allotment will allow for a new, stand-alone DTV voice to be introduced in the Knoxville television market. Such an introduction will clearly serve the public interest. In contrast, a denial of the KC25 proposal would prevent the implementation of new television service of any kind for the foreseeable future, thereby denying the residents of the Knoxville area of an

additional television voice. This action would equally clearly be contrary to the public interest.

## IV. Conclusion

17. In sum, KC25 has attempted to follow the processes outlined by the Commission as it has pursued its application for a new television station at Knoxville. When the originally allotted channel was displaced by a DTV allotment, a petition for rule making to change to Channel 25 was timely submitted. As set forth above, that petition was acceptable as filed. While some defects appeared to exist in that petition, no actual impediments which had not been fully addressed existed at the time of filing, and all apparent difficulties have been resolved. As the petition remained pending for a substantial period, however, and in the hope of expediting the process, KC25 submitted a supplemental, alternate proposal to allot DTV Channel 7 in lieu of the originally allotted channel, as such a DTV alternate had been expressly contemplated by the Commission's Window Filing Notice. Only later did the filing of a DTV maximization application by an unrelated third party place a further roadblock in the way of an immediate grant of the Channel 25 proposal, and KC25 turned to advancing its DTV Channel 7 proposal as its primary proposal. That proposal fully resolves all remaining issues and is currently grantable. Such a grant would serve the public interest by providing a new, stand-alone DTV station in the market, thereby adding another television voice and advancing the DTV transition. For all of the foregoing reasons, and as previously set forth in earlier filings, a

Notice of Proposed Rule Making advancing the DTV Channel 7 proposal should be adopted and released forthwith.

Respectfully submitted,

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